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IN THE

# Supreme Court of the United States

October Term, 1971

No. .....

WILFRED KEYES, *et al.*,

*Petitioners and*
*Cross Respondents*

v.

SCHOOL DISTRICT NO. 1,
DENVER, COLORADO, *et al.*,

*Respondents and*
*Cross Petitioners*

## CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Cross petitioners will file a brief in opposition to the petition for certiorari filed by petitioners, however, should the Court grant petitioners' petition for certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered on June 11, 1971, such review should include the questions presented herein.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 445 F.2d 990, and appears in the Appendix to petitioners' peti-

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tion for writ of certiorari herein. The order of the Court of Appeals clarifying its June 11, 1971 opinion, issued on August 30, 1971, is printed in the Appendix to this conditional cross petition. The opinions of the District Court for the District of Colorado are reported at 303 F. Supp. 279; 303 F. Supp. 289; 313 F. Supp. 61; and 313 F. Supp. 90, and appear in the Appendix to petitioners' petition for writ of certiorari herein.

## JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 11, 1971, and no petition for rehearing was filed therein. On September 8, 1971, Mr. Justice Marshall ordered that the time for filing this petition be extended to and including October 25, 1971. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

I. IN A SCHOOL DISTRICT WHICH HAS NEVER MAINTAINED A DUAL SYSTEM, DO THE ACTS OF A SCHOOL BOARD IN CONSTRUCTING NEW FACILITIES AND MAKING MINOR BOUNDARY CHANGES TO ACCOMMODATE INCREASING NUMBERS OF CHILDREN MOVING INTO SCHOOL SUBDISTRICTS, ACCOMPANIED BY A CHANGE IN THE RACIAL COMPOSITION OF THE AREA TO PREDOMINANTLY NEGRO, CONSTITUTE *DE JURE* SEGREGATION IN VIOLATION OF THE FOURTEENTH AMENDMENT, EVEN THOUGH SUCH ACTS OF THE SCHOOL BOARD, STANDING ALONE, COULD NOT HAVE CAUSED SUCH SCHOOLS TO BECOME PREDOMINANTLY NEGRO?

II. IN A SCHOOL DISTRICT WHICH HAS NEVER MAINTAINED A DUAL SYSTEM, DOES THE

CONSTITUTION REQUIRE IMPLEMENTATION OF THE SCHOOL BOARD'S RESCINDED BUT UNEXECUTED PLANS FOR REDUCING MINORITY CONCENTRATIONS AND RACIAL IMBALANCE IN EIGHT OF ITS ONE HUNDRED EIGHTEEN SCHOOLS WHERE THE FEDERAL COURTS HAVE CONCLUDED THAT STATE ACTION CAUSED SEGREGATION AT ONLY FOUR OF THE EIGHT SCHOOLS AND THAT THREE OF THE REMAINING FOUR WERE NOT SEGREGATED EITHER *DE FACTO* OR *DE JURE?*

III. DOES THE IMPLEMENTATION OF A COURT APPROVED VOLUNTARY MAJORITY TO MINORITY TRANSFER PLAN WITH TRANSPORTATION PROVIDED, WHICH REDUCES THE CONCENTRATION OF NEGRO PUPILS IN AN ELEMENTARY SCHOOL FOUND TO BE SEGREGATED BY STATE ACTION FROM 84.4% TO 58.4%, SATISFY THE CONSTITUTIONAL REQUIREMENT TO REMEDY THE EFFECTS OF STATE IMPOSED SEGREGATION?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States which is set out verbatim in petitioners' petition.

## STATEMENT OF THE CASE

This action was commenced in the United States District Court for the District of Colorado in June of 1969, by Anglo (white, excluding Spanish surnamed), Negro, and Hispano (Spanish surnamed) parents of children attending public schools in Denver, Colorado, suing individually, on

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behalf of their minor children, and on behalf of classes of persons similarly situated, alleging violations of their constitutional rights and seeking to remedy the alleged racial or ethnic segregation of certain of the Denver public schools.

The complaint contained two separate causes of action. The first cause of action alleged racial segregation in certain of the schools of northeast Denver and prayed that rescission of three resolutions of the Board of Education numbered 1520, 1524, and 1531, providing for the stabilization of the racial and ethnic composition of pupil memberships in certain schools, be declared null and void and that the resolutions be reinstated and implemented. The second cause of action alleged racial segregation and a denial of equal educational opportunity in other public schools in Denver and prayed, *inter alia,* for an order desegregating these schools.

The District Court granted a preliminary injunction ordering implementation of the three resolutions of the Board of Education, except as they affected East High School and Cole Junior High School, after preliminary hearing on the first cause of action. *Keyes v. School District Number One, Denver, Colorado,* 303 F. Supp. 279 (July 31, 1969). The United States Court of Appeals for the Tenth Circuit remanded the case to the District Court for consideration of the effect of Section 407(a) of the 1964 Civil Rights Act and the District Court issued an opinion containing Supplemental Findings, Conclusions and Temporary Injunction on August 14, 1969, which is reported at 303 F. Supp. 289.

The entire case was tried on the merits in February of 1970, and the District Court issued a Memorandum Opinion and Order on March 21, 1970, which is reported at 313 F. Supp. 61, and which reaffirmed the findings and conclu-

sions of *de jure* segregation as to the first cause of action; found that the racial imbalance in the schools which were the subject of the second cause of action was not caused by state action but that the schools which were over 70% Negro or over 70% Hispano were not providing an equal educational opportunity. After further hearing the District Court issued a Decision re Plan or Remedy on May 21, 1970, which is reported at 313 F. Supp. 90.

There was an appeal and cross-appeal to the United States Court of Appeals for the Tenth Circuit. The opinion of the Court of Appeals was issued on June 11, 1971, and, in essence, affirmed the judgment of the District Court on the first cause of action and reversed it on the second cause of action. On August 30, 1971, the Court of Appeals issued its order clarifying its June 11, 1971 opinion requiring that immediate steps be taken to formulate and carry out a plan of desegregation for Hallett and Stedman Elementary Schools. The order of the District Court in compliance with this order was entered on September 28, 1971 and is printed in the appendix hereto. Another order of the District Court modifying this order was entered on October 15, 1971, and is also printed in the appendix hereto.

This conditional cross petition seeks review of the judgment of the Court of Appeals on the first cause of action only.

Denver has never maintained separate educational facilities for different races. Pupils in the Denver school system are assigned to schools on the basis of their residence. School attendance areas are established for each school based upon a so-called neighborhood school policy. The eight schools which were the subject of the Board's three resolutions were: Barrett, Park Hill, Philips, Hallett and Stedman elementary schools; Cole and Smiley junior high

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schools; and East High School. The four schools which were found to be segregated by prior actions of the Board were Barrett, Hallett and Stedman elementary schools and Smiley Junior High School. The trial court expressly found that Cole, although a predominantly minority school, was not made so by state action. It also found that Park Hill and Philips elementary schools and East High School were not segregated schools either *de jure* or *de facto*.

Prior to the end of World War II all these schools were predominantly white. Shortly after World War II, the small Negro population of Denver which was concentrated in the north central area of the City began to increase and move into white residential areas to the east. In addition to changing the racial composition of the public schools in its path, this migration caused overcrowding in those schools because families were larger. This condition required school authorities to construct additional facilities, both temporary and permanent, and to adjust attendance boundaries of certain schools in order to accommodate increasing numbers of school children.

The trial court found and concluded from the evidence that the circumstances surrounding the construction of Barrett Elementary School in 1959 and 1960 evidenced purposeful action on the part of the Board of Education to create a predominantly Negro school. It also found from the evidence that minor changes in 1962 and 1964 in the easterly and southerly subdistrict boundaries of Stedman and Hallett elementary schools resulted in moving some of the white pupils out of these schools at the same time that the eastward Negro migration engulfed them and concluded that these were acts of segregation which caused these two schools to become segregated. The findings and conclusions as to Smiley Junior High School are even more tenuous. No boundaries had been changed during the Negro migration

and the school had been constructed prior to the Negro migration. Yet, the trial court found that because of the racial composition of the student body and faculty, the racial composition of the Smiley feeders (which included Stedman and Hallett, but not Barrett), and the Negro population movement into the area, Smiley was a segregated school in 1968; that the resolutions of the Board passed in 1969, to take effect that fall, were designed to reduce the Negro percentages; and that in the absence of the resolutions, the Negro percentages would increase as a result of future Negro population movement.

The trial court's finding of *de jure* segregation at Cole Junior High School was based entirely on rescission of the Board's resolution:

> "The rescission of Resolution 1524 as applied to Cole Junior High was an action taken which had the effect of frustrating an effort at Cole which at least constituted a start toward ultimate improvement in the quality of educational effort there." 313 F. Supp. 61, 67.

> ". . . [T]he segregation (or racial concentration) which presently exists at Manual and Cole, except insofar as Cole was affected by Resolution 1524 and its rescission as explained above in part I, is not *de jure*." *Id.* at 75.

The trial court expressly found from the uncontroverted evidence that Park Hill, Philips and East were not even segregated.

> "Thus, even though Philips and Park Hill were not segregated as of 1969, the Board felt that effective desegregation could take place at Bar-

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> rett, Stedman, and Hallett only if other Park Hill area schools were included in a total plan." 303 F. Supp. 289, 292.
>
> "Neither before nor after the passage of 1520 could East be considered a segregated school." *Id.* at 294.

Because there was no evidence of *de jure* segregation at East and Cole, the preliminary injunction mandating the three resolutions expressly omitted East and Cole (303 F. Supp. 289, 296), although the order included Park Hill and Philips because they were deemed necessary to the relief of the other Park Hill schools.

Later, after the trial on the merits, the trial court rested its ruling that the resolutions should be implemented as to East and Cole on the conclusion of law that the recission of the resolutions was the operative act of *de jure* segregation and therefore unconstitutional. 313 F. Supp. 61.

The Court of Appeals, in its treatment of this portion of the case, reviewed the trial court's findings of acts of *de jure* segregation as to Barrett, Stedman, Hallett and Smiley (as to Smiley, it omitted the feeder theory and substituted a reference to the permitting of whites to transfer out of Smiley, although the trial court made no such finding in this regard), and applying Rule 52, F.R.Civ.P., concluded that these findings were not clearly erroneous and affirmed them.

Then, on Page 23 of its opinion, the Court of Appeals concluded:

> "Since we have sustained the findings regarding state imposed segregation in the Park Hill area schools, it is unnecessary to futher decide whether the rescission of Resolutions 1520, 1524 and 1531 was also an act of de jure segregation."

Yet rescission was the basis and the only basis for implementing the rescinded resolutions as to Park Hill, Philips, Cole and East.

Thus, the opinion of the Court of Appeals, provides no legal basis for the remedy (reinstatement of the resolutions) as to Park Hill, Philips, Cole and East.

Prior to the commencement of this action and in the fall of 1968, the Board of Education instituted a voluntary open enrollment policy (V.O.E.) which permitted majority to minority transfers with transportation provided whenever such transfers improved integration. It decided to employ this policy in the Hallett demonstration integrated school plan which was contained in rescinded Resolution 1531 and in Resolution 1533 which replaced the rescinded resolutions.

As a result of the operation of this plan during 1969 and 1970, the Negro enrollment at Hallett Elementary School was reduced from 84.4% in 1968 to 58.4% in the fall of 1970, 12 percentage points below what the trial court viewed as a segregated school. Yet in the fall of 1971, both the Court of Appeals and the District Court ordered additional mandatory reduction in the Negro population at Hallett.

## REASONS FOR GRANTING THE WRIT

Cross petitioners intend that this Conditional Cross Petition be considered only in the event this Court determines to grant the petition of petitioners. While cross petitioners do not agree with petitioners' reasons for granting the writ, they do urge that if this Court determines that it will review this case, it should review the entire case and resolve all questions therein.

The questions raised by the decisions of the lower federal courts on the first cause of action in this case are important

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constitutional questions which have not been decided by this Court.

Since *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court has taken and decided many cases involving formerly dual school systems and while questions continue to arise in these jurisdictions which need to be settled by this Court, many cases are now working their way up the federal court system from jurisdictions which have never maintained dual school systems. This Court has denied certiorari in the northern and western cases presented to it up to this time. *Taylor v. Board of Education of City School District of New Rochelle*, 294 F.2d 36 (2nd Cir. 1961), *cert. den.* 368 U.S. 940 (1961); *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. den.* 389 U.S. 847 (1967); *Deal v. Cincinnati Board of Education*, 419 F.2d 1387 (6th Cir. 1969), *cert. den.*____U.S.____, 29 L.Ed. 2d 128 (1971); *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), *cert. den.* 377 U.S. 924 (1964); *Downs v. Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), *cert. den.* 380 U.S. 914 (1965); and *United States v. School District No. 151, Cook County, Illinois*, 404 F.2d 1125 (7th Cir. 1968), *cert. den.*____U.S.____, 29 L.Ed. 2d 111 (1971).

When *Brown* and its companion cases were decided in 1954, the word went out very clearly. Dual systems are forbidden by the Constitution. No such clear guidance exists as to what the Constitution requires of boards of education which have never operated dual systems but are faced with racially imbalanced schools and population shifts which cause the racial composition of schools to change.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), this Court answered one of the questions suggested by the Chief Justice in his separate opinion

in *Northcross v. Board of Education of Memphis*, 397 U.S. 232 (1970), when it stated:

> "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S. at 24.

This statement of the law would seem to apply with equal force to systems which have never maintained racially separate schools.

Other language in *Swann*, although intended to apply to dual system cases, should apply with equal force to systems which have always been unitary:

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be 'unitary' in the sense required by our decisions in *Green* and *Alexander*.
>
> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or

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> alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 U.S. at 31-32.

It thus appears that once a dual system has been desegregated, it is on the same footing with a school district which has never operated a dual system. Both are unitary systems and neither has a constitutional duty to make periodic adjustments of the racial composition of student bodies even though population shifts occur. Yet, school districts are free, in the exercise of discretionary educational policy, to attempt to alter racial imbalance without violating the Constitution:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." 402 U.S. at 16.

If these actions are truly within the discretion of local school authorities, they may be reversed, rescinded or replaced with other and different policy actions without violating the Constitution.

To the extent the courts below have invaded this area of governmental action reserved to the local school board, their actions are in conflict with the decision of this Court and their decisions should be reviewed by it.

## CONCLUSION

The decisions of the courts below on the first cause of action in this case usurp the discretionary power of the school authorities at the very least as to four of the eight schools involved and the effect of their holdings is that school boards have a constitutional duty to foresee and remedy the effects of demographic mobility contrary to the decision of this Court in *Swann*. For these and the foregoing reasons, cross petitioners respectfully request that this Court grant their cross petition if it grants the petitioners' petition.

*Respectfully submitted,*

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*Attorneys for Respondent and Cross Petitioners*

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# APPENDIX

## JULY TERM—AUGUST 30, 1971

Before Honorable John C. Pickett, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges

WILFRED KEYES, etc., et al.,
*Plaintiffs-Appellees,*

v.

SCHOOL DISTRICT NUMBER ONE,
DENVER, COLORADO, et al.,
*Defendants, Appellants,*

AND

MR. AND MRS. DOUGLAS BARNETT,
etc., et al.,
*Intervening Defendants.*

Nos. 336-70
and
337-70

Appellees-plaintiffs in the captioned appeal have filed what they denominate as a "Motion For Clarification Of Opinion." As pointed out in that motion, both the Trial Court and this Court have determined the Hallett and Stedman schools to be *de jure* segregated schools. Under authority of our opinion, immediate steps should be taken to formulate and carry out a plan of desegregation for such schools. We do not deem this action to be a proper function of an Appellate Court.

The authority of the Trial Court to hear these matters and to determine the proper relief to be granted is clearly set out in the last sentence of our opinion.

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Teste

*/s/ Howard K. Phillips*
HOWARD K. PHILLIPS
Clerk

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

*By /s/ Anne Cabot*
Deputy Clerk

## APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-1499

WILFRED KEYES, et al.,
*Plaintiffs,*

vs.

SCHOOL DISTRICT NO. 1,
DENVER, COLORADO, et al.
*Defendants.*

ORDER RE DESEGREGATION OF HALLETT AND STEDMAN ELEMENTARY SCHOOLS

THIS MATTER coming on for hearing on September 8, 1971, in compliance with the Order of the Court of Appeals for the Tenth Circuit dated August 30, 1971, stating that immediate steps should be taken to formulate and carry out a plan for the disestablishment of *de jure* segregation at Hallett and Stedman Elementary Schools, the Court, having heard the evidence and the statements of counsel, finds as follows:

1. That the constitutional rights of the minority school children attending these *de jure* segregated schools should be restored as quickly as is practicable under the circumstances.
2. That no just cause exists for delaying the disestablishment of *de jure* segregation at Hallett and Stedman Elementary Schools beyond Monday, November 8, 1971; the school district already having in existence plans for such disestablishment.

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3. That the school district requires some time to allow for making adjustments in the plan as selected by the Court, to ensure that the desegregation called for herein is effective, and further, needs some additional time for the preparation of the schools affected, the teachers, staff, pupils and parents, for the implementation of the plan.

4. That "Plan A" as proposed by the school administration in its Report of June 8, 1970, and as it relates to the desegregation of Hallett and Stedman shall be implemented by the defendants, amended to the extent necessary to carry out this Court's Order, set forth below.

WHEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

A. That the disestablishment of *de jure* segregation at Hallett and Stedman Elementary Schools shall be accomplished no later than Monday, November 8, 1971*; as a minimum the implementation will in fact create the racial compositions at all affected schools projected in the June 8, 1970 Report under Plan A;

B. That on or before Friday, October 8, 1971, the defendants shall present to the Court and the community the details of the plan to be implemented on November 8, 1971, including the resulting racial compositions at the affected schools;

C. The defendants shall conduct a racial and ethnic census of the students in the geographic areas designated

---

*The School District is, of course, free to implement this order at an earlier date if it is ready to implement it and if it believes that disruption would be minimized thereby.

under Plan A relating to desegregation of Hallett and Stedman, including the areas in Montbello to be assigned to those schools; such census shall be completed prior to presentation of the plan on October 8, 1971;

D. Prior to Friday, October 8, 1971, the defendants shall make any adjustments in geographic areas under Plan A required to ensure the racial compositions under the Plan, and shall incorporate such changes together with any necessary changes in receiving schools into the Plan prior to presentation on October 8, 1971.

E. Prior to Friday, October 8, 1971, the defendants shall have included in the Plan provisions for:

1. Faculty and staff assignments;
2. Transportation of children affected by the plan and the specific details thereof shall be finalized no later than Friday, October 22, 1971.
3. Programs for the training of teachers in the affected schools with regard to minority history and culture and how to effectively teach in an integrated environment.
4. Provisions for orientation programs at the new schools, parent-faculty conferences, open houses and other means for promoting familiarity with the new school, understanding of the Plan and affording those affected an opportunity to have questions answered concerning the Plan.
5. Any required changes in the curriculum, and the specific details thereof shall be finalized no later than Friday, October 22, 1971.
6. Compensatory or remedial educational programs shall continue to be provided in the new schools after implementation for those children previously enrolled in such programs.

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F. The Superintendent or his designee may make individual adjustments for particular students affected by any of the Orders of this Court in this Action in cases of hardship, or for other valid, equitable reasons where it is determined by the Superintendent or his designee that valid reasons exist and that the adjustment is not for the purpose of avoiding this Court's Orders. A record of each such adjustment, including the reason or reasons therefor shall be maintained.

G. Those students now participating in the Hallett Plan shall continue; those students now being transported to relieve overcrowding at Hallett and Stedman shall continue in the schools to which they are presently assigned.

H. The Plan shall provide for the transportation of all students affected, said transportation to be provided by the School District without cost to the student.

I. Any changes in Plan A believed necessary by defendants to carry out this Order shall be described and presented to Counsel for plaintiffs at least five days prior to presentation to the Court on October 8, 1971.

J. Decision on plaintiffs' request for the appointment of a lay advisory committee is deferred for the present.

DATED this 27th day of September, 1971.

BY THE COURT

*/s/ William E. Doyle*

William E. Doyle, Judge

APPROVED AS TO FORM:

Wood, Ris & Hames

By_____

William K. Ris

HENRY, COCKRELL, QUINN & CREIGHTON

By_____

Benjamin L. Craig

*Attorneys for Defendants*

*/s/ Gordon G. Greiner*

Gordon G. Greiner

*Attorney for Plaintiffs*

ENTERED
ON THE DOCKET
SEP. 28, 1971
G. WALTER BOWMAN
CLERK

BY: S.H.
DEP. CLERK

## APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-1499

WILFRED KEYES, et al.,
*Plaintiffs,*

vs.

SCHOOL DISTRICT NO. 1,
DENVER, COLORADO, et al.
*Defendants.*

ORDER

THIS MATTER coming on upon the stipulation of the parties, and the Court having examined the Stipulation and the file herein and being otherwise fully advised in the premises DOTH ORDER:

1. That the previous Order re: Desegregation of Hallett and Stedman Elementary Schools entered on September 28, 1971, following hearing on September 8, 1971, be, and the same is hereby modified as follows:

(a) The effective date for the implementation of plans to desegregate Hallett and Stedman Elementary Schools is hereby established as the beginning of the second semester of the 1971-1972 school year rather than November 8, 1971, as provided in said order.

(b) "Plan A" as modified in the Hallett-Stedman Plan, attached to the Stipulation of the parties as Exhibit A, be and the same is hereby approved for implementation at the

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beginning of the second semester of the 1971-1972 school year.

(c) The specific details of "Plan A" as modified in the Hallett-Stedman Plan shall be developed no later than December 1, 1971.

DATED this 15th day of October, 1971.

BY THE COURT:

*/s/ William E. Doyle*

William E. Doyle, Judge

APPROVED AS TO FORM:

*/s/ Gordon G. Greiner*

Gordon G. Greiner

HENRY, COCKRELL, QUINN & CREIGHTON

*/s/ Michael H. Jackson*

*Attorneys for Defendants*

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DEC 3 1971

E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-572

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

*Petitioners,*

vs.

WILFRED KEYES, *et al.*

## BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-572

---

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

*Petitioners,*

VS.

WILFRED KEYES, *et al.*

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## BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondents Keyes, *et al.* submit this Brief in Opposition to the Conditional Cross-Petition for a Writ of Certiorari.

### Statement of the Case

On August 30, 1971 the Court of Appeals, in response to a motion by respondents which pointed out that no relief had been provided for state-imposed segregation at two elementary schools, Hallett and Stedman, ordered the trial court to hold a hearing and determine the proper relief to be granted.

Neither in opposition to respondents' motion to the Court of Appeals nor at the trial court hearing did cross-petitioners take the position that segregation had been

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sufficiently disestablished at Hallett. On September 27, 1971 the trial court issued its Order Re Desegregation of Hallett and Stedman Elementary Schools, which included a finding that *de jure* segregation still existed at those schools. Thereafter, on October 7, 1971, cross-petitioners filed a Notice of Appeal to the Court of Appeals.

After the filing of the Notice of Appeal petitioners' and respondents' counsel reached agreement upon a stipulation modifying the district court's order of September 27, 1971. The stipulation was accepted by the trial court and on October 15, 1971 it issued an Order modifying its previous Order in accordance therewith. Subsequently, the parties entered into a Stipulation for the dismissal of the appeal and on November 8, 1971 the trial court entered its Order Dismissing Appeal.

The statement appearing at page 9 of the Conditional Cross Petition relating to the result of the Hallett Plan is in error. The correct figures are as follows:

| | % *Negro* | % *Hispano* | % *Anglo* |
|---|---|---|---|
| September, 1968 | 84.4 | 5.5 | 10.1 |
| September, 1969 | 58.4 | 3.4 | 38.2 |
| September, 1970 | 60.6 | 3.1 | 36.3 |
| September, 1971 | 64.8 | 4.8 | 30.4 |

The Anglo enrollment figures for 1970 and 1971 include Anglos from the Montbello residential area who have no "neighborhood school" and who are assigned to Hallett; they are not participants in the voluntary Hallett Plan.

## ARGUMENT

That the three questions presented by the cross petition are insubstantial is reflected by the conditional nature in which they are sought to be presented.

As set forth below, cross-petitioners' issues either: (1) are already fairly encompassed in the original Petition for Certiorari filed by respondents Keyes, *et al.*, No. 71-507; (2) present no conflict either among the Courts of Appeals or with the decisions of this Court; or (3) have been voluntarily settled and compromised by cross-petitioners and are therefore not properly subject to this Court's jurisdiction.

In their first question presented the cross-petitioners seek review of that portion of the opinion of the Court of Appeals of June 11, 1971 which affirmed the trial court's finding of intentional segregation of schools in the Park Hill area of Denver.

The legal theories applied to the facts by the trial court and affirmed by the Court of Appeals are entirely consistent with the decisions of other Courts of Appeals; *e.g., Taylor* v. *Board of Educ.*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); *United States* v. *School Dist. No. 151*, 404 F.2d 1125 (7th Cir. 1968), 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *United States* v. *Board of Educ., Tulsa*, 429 F.2d 1253 (10th Cir. 1970); *Davis* v. *School Dist. of Pontiac*, 443 F.2d 573 (6th Cir.); *cert. denied*, —— U.S. —— (1971). All of the foregoing cases recognize that school authorities may not gerrymander school boundaries, manipulate the size of new schools and their attendance boundaries, or take other discriminatory action which the officials know will result in the isolation and segregation of schoolchildren accord-

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ing to their race. Indeed, it is the inconsistent application of the law to the facts found below which is a primary issue presented by the Petition for Certiorari filed by respondents Keyes, *et al.*

Similarly, the first question presented does not reflect a conflict between the opinion below and this Court's decision in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *Swann* clearly supports the decisions below on this question, recognizing that intentional segregatory acts of school authorities may require the intervention of the federal courts to restore constitutional rights:

> This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that when the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary. 402 U.S. at 31-32.

Similarly, the second question presents no substantial issue. It deals with the trial court's discretion to formulate an appropriate remedy where the school authorities have failed and refused to come forward with a plan for relief of state-imposed segregation. Even at the preliminary injunction stage, the trial court clearly stated that the cross-petitioners could still adopt and implement another plan "embodying the underlying principles" of the withdrawn plan, if it so desired. Appendix to Petition in No. 71-507, p. 18a; see also, p. 37a. The cross-petitioners having refused assistance to the trial court, now seek to contest the relief granted. That relief was clearly within the district court's discretionary powers, and the Court

of Appeals found no abuse of discretion. Cf. *Swann*, 402 U.S. at 16:

> In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.

As to the third question raised in the cross-petition, as described above the trial court's Order of October 15, 1971 was the result of a voluntary stipulation between the cross-petitioners and respondents, a condition of which was that cross-petitioners would withdraw their Notice of Appeal from the September 27 order. The notice was withdrawn and the appeal dismissed on November 8, 1971 by Order of the district court entered on the basis of a Stipulation of November 5, 1971.

Clearly by their acts the cross-petitioners should be held to have waived any objections to the plans for Hallett and Stedman, and such issue is consequently not properly before this Court.

Even if respondents are in error as to the effect of the voluntary dismissal of the appeal below, the record clearly supports the decisions below that there was no sufficient disestablishment of segregation at Hallett, and that in fact such segregation was increasing from the September, 1969 level. Where freedom of choice has failed to disestablish segregation the trial court clearly has the power to impose an effective remedy. *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968).

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## CONCLUSION

Contrary to the cross-petitioners' assertion that the decisions below have intruded into and usurped the discretionary powers of school authorities, respondents respectfully contend that under the authority of the decisions of this Court and the Courts of Appeals the courts below failed to go far enough to remedy the constitutional deprivations demonstrated by the record below. The cross-petition presents no substantial issue which is not already presented in the Petition for Certiorari of Keyes, *et al.*, No. 71-507.

For the foregoing reasons, respondents pray that the cross-petition for certiorari be denied and that the main Petition in No. 71-507 be granted.

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